*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

## ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-174

DECEMBER TERM, 2003

| | | |
|---|---|---|
| State of Vermont | } | APPEALED FROM: |
| v. | } | District Court of Vermont, Unit No. 3, Orleans Circuit |
| Byron Martin | } | DOCKET NO 338-6-02 OsCr |
| | } | Trial Judge: Walter M. Morris, Jr. |

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of possession of stolen property, arguing that the trial court erred by denying his motion to suppress a statement he made to investigating officers. We affirm.

This case centers around a statement defendant allegedly made to one of the state troopers executing a search warrant at his residence. According to the trooper, when he was questioning another resident of defendant= s home concerning a refrigerator suspected of being stolen, defendant interjected that everything in the house was his responsibility. After defendant was charged with possession of stolen property, he filed a motion to suppress, arguing that the statement resulted from unlawful police questioning after he had been placed in custody, in violation of his Fifth Amendment privilege against self-incrimination.

At an evidentiary hearing on defendant= s motion to suppress, the parties agreed that defendant had been placed in custody at the time he made the statement, but disagreed as to whether the statement resulted from police interrogation. One of the troopers testified that defendant made the statement while the officer was asking another resident of the home where the refrigerator had come from. Defense counsel extensively cross-examined the trooper on this point and impeached him with his earlier deposition testimony. At the deposition, when defense counsel asked what the context of defendant= s statement had been and whether the officer had asked defendant a question, the trooper answered: A I did. I said where did the refrigerator come from, or something like that, or how did (inaudible) well everything that= s in here is my responsibility.@ In response to cross-examination at the motions hearing, the trooper explained that initially he was speaking only to the other resident when defendant blurted out the statement, but that when he continued to ask the question, and defendant continued to respond with the same statement, the officer began to direct his questions more generally to both defendant and the other resident. Both attorneys, on redirect and recross, examined the officer extensively on the circumstances surrounding defendant= s statement.

The court took judicial notice of the trooper= s earlier deposition, but defendant did not seek to have the deposition admitted into evidence. During his closing argument at the motions hearing, after the witnesses had testified, defendant asked the court to admit the deposition. The prosecutor objected, arguing that admitting the deposition after the close of evidence would deprive the State of an opportunity to examine the witnesses concerning all of the deposition testimony. The court denied defendant= s request to admit the deposition, but stated that it had taken close notes of the excerpts of the deposition testimony cited at the hearing. Following argument by counsel, the court noted that defendant= s statement was plainly not the product of direct police interrogation, but indicated that it would give further consideration as to whether the statement was made in response to the functional equivalent of interrogation. Later, the court issued a written decision denying the motion to suppress. In the court= s view, the credible evidence established that defendant

volunteered the challenged statement in response to questioning directed at the other resident. The court made this finding while acknowledging that the trooper= s deposition testimony could be construed as suggesting otherwise. At trial, defense counsel renewed his motion to suppress after impeaching the trooper based on his deposition testimony, but the court stood by its earlier ruling.

On appeal, defendant argues that the trial court erred in denying his motion to suppress without considering the trooper= s deposition testimony. We reject this argument, which has a faulty premise. At the motions hearing, defense counsel repeated the critical deposition testimony on several occasions. The trial court expressly stated that it had taken careful notes on the excerpts of the deposition testimony cited by defense counsel. Further, in its written decision, the court expressly noted that the deposition testimony could be construed as showing that the officer directed his questioning to defendant, but nonetheless found, after considering the officer= s testimony on direct and cross examination at the motions hearing, that defendant volunteered the statement in response to questioning directed at the other resident. A Resolution of a motion to suppress involves a mixed question of fact and law,@ and A [w]e must accept the trial court= s findings of fact unless they are clearly erroneous.@ State v. Simoneau, 2003 VT 83, & 14, 14 Vt. L.Wk. 233, 234. In this case, there is support in the record for the trial court= s finding that defendant volunteered the challenged statement in response to questioning directed at another person.

Affirmed.

BY THE COURT:

_____

Jeffrey L. Amestoy, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice